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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-20) is reported at 464 F. 2d 1313. The opinions of the Federal Communications Commission (Pet. App. B-1 to B-30 and B-33 to B-59) are reported at 23 F.C.C. 2d 880 and 28 F.C.C. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1972, and petitions for rehearing were denied on October 2, 1972. The petition for a writ of certiorari was filed on January 2, 1973. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1) and 2350.

QUESTION PRESENTED

Whether the Federal Communications Commission acted within its authority under 31 U.S.C. 483a, in imposing annual fees on cable television systems after taking into account "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts" as required by the statute.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act, 1952 (31 U.S.C. 483a) provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the Executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine,

in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this Title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this Title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

National Cable Television Association, Inc. (NCTA), seeks review of a decision of the court of appeals, affirming an order of the Federal Communications Commission under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, imposing annual fees on cable television systems.

The Commission first established fees to be paid by beneficiaries of Commission regulation in 1963 (*Fees,* 34 F.C.C. 811, affirmed, *Aeronautical Radio* v. *United States,* 335 F.2d 304 (C.A. 7), certiorari denied, 379 U.S. 966), and its fee schedule has been under continuing review since that time. See *Fees,* 1 F.C.C. 2d 1349. Consistent with this continuing review and with congressional directives that fee charges be adjusted upward to make Commission activities more nearly

self-sustaining,[1] the Commission issued a Notice of Proposed Rule Making on February 18, 1970, *Schedule of Fees,* 21 F.C.C. 2d 502 (35 Fed. Reg. 3815). The notice indicated that the Commission was undertaking a comprehensive revision of its fee policy with respect to all communications services subject to its regulation. The notice included new fee proposals for community antenna television (CATV) operations, and for the testing and approval of radio frequency equipment.[2]

In its proposed rules, the Commission sought to reflect more accurately the "value to the recipient" standard set forth in 31 U.S.C. 483a by imposing fees related to the value of an authorization or license. It explained, however, that "value to the recipient" varied when assessed in the context of different communications services (35 Fed. Reg. 3815, 3816–3817):

> Broadcast services are commercial enterprises which exist on an "advertiser-supported" basis,

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[1] See, *e.g.*, H. Rep. No. 91–316, 91st Cong., 1st Sess., p. 8; H. Rep. No. 91–649, 91st Cong., 1st Sess., p. 6.

[2] These areas, the Commission noted, are "the subject of Commission regulation and * * * directly or indirectly receive what in effect is a Commission authorization tantamount to a [license]." 35 Fed. Reg. 3815, 3816. It further observed that cable systems, "as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations." *Id.* at 3816. And, "[w]hile the Commission's regulatory approach does not require a prior approval by the Commission in the form of a 'license' before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations." *Id.* at 3816.

without direct charge to the listening public, while common carrier communication companies provide their services to all users at prices set forth in tariffs. On the other hand, CATV systems operate on a somewhat similar basis as common carriers but their provision of but one kind of service to each subscriber at the same price permits a different approach in considering "value to the recipient" than is possible with communications common carriers which utilize the same facilities for the provision of different services to different customers.

After considering extensive comments by interested parties, the Commission adopted on July 1, 1970, the revised *Schedule of Fees* (Pet. App. B–1). The fee schedule resulted from the Commission's consideration of direct and indirect costs to the government, public policy, and value to the recipient of its services, with the overriding statutory objective that the agency's work be "self-sustaining to the full extent possible."

The Commission found that CATV revenues were approximately $220,000,000 (Pet. App. B–6), and that the Commission expended $1,145,400 annually or 4.6 percent of its total budget on its cable television activities (Pet. App. B–3). To recover these costs, the Commission established for each CATV system an annual fee of 30 cents multiplied by the number of subscribers of the system. This amounted to 0.5 percent or less of a system's revenues (Pet. App. B–19). On petitions for reconsideration, the Commission made certain modifications to its fee schedule but did not alter the basic annual fees imposed on cable television operators (Pet. App. B–33, B–44 to B–45).

On petitions for review, the court of appeals affirmed

the fee schedule in all respects (Pet. App. A–20). The court found that the Commission has jurisdiction over CATV operators and that these operators "have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). It pointed to "various regulations designed to keep entry into the industry open," "proposed rules limiting the amount of franchise fees which local governments could charge cable operators," and the fact that "regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators" (Pet. App. A–17). Moreover, the court noted that the Commission's extensive broadcast regulation also benefits cable operators (Pet. App. A–18):

> CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

The court concluded that, in view of the benefits received by CATV systems and the congressional policy in favor of making the Commission's operations as self-sustaining as possible, the Commission's action in imposing the annual fees was not unreason-

able or arbitrary (Pet. App. A–19 to A–20). Petitions for rehearing were denied (Pet. App. A–21).[3]

ARGUMENT

1. The court of appeals correctly ruled that the Commission acted within its authority under 31 U.S.C. 483a in imposing annual fees on the cable television industry.

The Commission has regulatory jurisdiction over cable television systems. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *United States* v. *Midwest Video Corp.*, 406 U.S. 649. In its earlier regulation, the Commission was concerned that cable operators importing distant signals might impair or destroy free broadcasting operations and thus restricted such distant signal importation. The Commission's traditional activity of protecting the engineering integrity of broadcast signals in the public's electromagnetic spectrum insured that cable operators would in fact have adequate free broadcast signals to carry. As its regulations developed, the Commission promulgated rules designed to keep entry

[3] Since the decision below, the President, in his 1974 budget, proposed substantial increases for FCC cable activities, including 53 new positions at a cost of approximately $710,000. And, in December 1972, the Commission published a *Notice of Proposed Rulemaking, Schedule of Fees*, 37 Fed. Reg. 28574. The notice observed that administrative costs attributable to cable regulation were expected to reach $3,000,000 or 7.3 percent of the Commission's total budget. To recover these additional costs, the Commission proposed to increase its annual CATV fees from 30 to 40 cents per subscriber. 37 Fed. Reg. 28574, 28580.

into the industry open (Pet. App. A–17) and to limit the franchise fees local governments could charge cable operators. See 47 C.F.R. 76.31(b) (36 F.C.C. 2d at 219). Thus, the Commission's regulation of CATV has changed substantially; many of the new rules inure to the benefit of cable operators. See, *e.g., Cable Television Report and Order,* 36 F.C.C. 2d 141.

NCTA contends that the fee schedule imposed by the Commission is invalid on the ground that the Commission did not properly consider the "value to the recipient" factor contained in 31 U.S.C. 483a. This argument—in essence a contention that the Commission acted arbitrarily in formulating the annual CATV fees—was properly rejected by the court below.

As the Seventh Circuit held in *Aeronautical Radio* v. *United States,* 335 F. 2d 304, certiorari denied, 379 U.S. 966, the Commission is obligated in imposing fees under 31 U.S.C. 483a to consider the direct and indirect costs to the government in performing its services for special beneficiaries, the public policy involved, and the value of the services to the recipient. With regard to the value factor, the Seventh Circuit stated (335 F. 2d at 310–311):

> [W]e see no requirement in § 140 [now 31 U.S.C. 483a] that "value to the recipient" need be pecuniary value. That is but one of the factors that the Commission had to take into account, and * * * the Commission may in its discretion determine what weight should be placed on each of the factors.

Under Bureau of the Budget Circular A–25, para. 5(b) (Pet. App. C–1, C–4), fees for special services imposed by regulatory agencies must not exceed the total cost of providing the services. Cognizant of the overriding statutory objective of making the agency's work "self-sustaining to the full extent possible," the Commission set forth its total costs of regulating cable television and arrived at fees aimed at recovering these costs. With respect to its consideration of the value received by cable television systems, the Commission explained (Pet. App. B–6):

> We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient." But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard. Revenues of our broadcast licensees in 1968 approximated 3.5 billion dollars. * * * In the same year, CATV system revenues approximated $220,000,000 * * *. Obviously, these figures are the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations to the persons and companies receiving them. Nevertheless, they do serve to place in perspective the very limited extent to which the Commission has considered the "value to the recipient" factor in establishing the fee schedule adopted herein.

Petitioner's contention that cable system operators generally disapprove of the Commission's regulations and therefore do not benefit from them is unsound. As the court stated, the inquiry under 31 U.S.C. 483a is not whether those regulated agree with the regulators, but rather "whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet App. A–18). The fees imposed are consistent with the congressional standards contained in 31 U.S.C. 483a, and the court's decision affirming those fees is consistent with both the statute and prior judicial holdings.

2. Petitioner urges that the decision below conflicts with the decision of the District of Columbia Circuit in *New England Power Co.* v. *Federal Power Commission*, 467 F. 2d 425 (set forth at Pet. App. D–1 to D–13), setting aside certain annual fees imposed by the Federal Power Commission on electric power utilities and natural gas companies subject to its jurisdiction. The Solicitor General, on behalf of the Federal Power Commission, has filed a petition for a writ of certiorari seeking review of that decision. *Federal Power Commission* v. *New England Power Co., et al.*, No. 72–1162. The nature of the FCC's regulation of the broadcast and CATV industries is sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different

regulatory agencies difficult;[4] the cases are thus distinguishable on their facts. In view of the significant benefits accruing to the CATV industry from federal regulation and identified by the FCC in its opinion, certiorari can appropriately be denied in this case regardless of the ultimate disposition of the *New England Power* case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1973.

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[4] The most fundamental factual distinction between the two cases is that the broadcast and CATV industries make use, either directly or indirectly, of the public's electromagnetic spectrum, whereas the electric power and natural gas industries make no comparable use of public property. Use of the public's airwaves in itself shows that the broadcast and CATV industries have benefited from federal regulation in a manner different from the public at large.

[5] In the alternative, the Court may wish to hold this case pending its decision with respect to the petition in *New England Power Co., supra.*

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